AXA AFFIN GENERAL INSURANCE BHD A

v.

MITSUI SUMITOMO INSURANCE (MALAYSIA BHD)

HIGH COURT MALAYA, KUALA LUMPUR B
TENGKU MAIMUN J
[SUIT NO: D3-22-263-2007]
10 JULY 2009

INSURANCE: *Marine insurance - Loss of cargo - Payment by insurers - Contribution, claim for - Double insurance - Construction of insurance policies - Difference in scope and interests insured - Incidental overlap will not by itself constitute double insurance - Issue of contribution did not arise as double insurance not proven* C

INSURANCE: *Goods policy - Payment of claims - Marine Cargo Policies - Contribution, claim for - Double insurance - Construction of insurance policies - Difference in scope and interests insured - Incidental overlap will not by itself constitute double insurance - Issue of contribution did not arise as double insurance not proven* D

SHIPPING: *Marine insurance - Goods policy - Loss of cargo - Payment by insurers - Contribution, claim for - Double insurance - Construction of insurance policies - Difference in scope and interests insured - Incidental overlap will not by itself constitute double insurance - Issue of contribution did not arise as double insurance not proven* E F

The plaintiff insured Diethelm and its associated companies under a Marine Open Cover Policy for any loss or damage to Diethelm's goods being shipped from any place in the world from warehouse to warehouse and also for all inland transit from any of Diethelm's premises within Malaysia, Singapore, Brunei and Thailand. Diethelm had a written agreement with Tomatrans (M) Sdn Bhd ('Tomatrans') for the transportation of Diethelm's goods in the southern zones of West Malaysia, while Tomatrans had taken out a Marine Cargo Insurance Policy with the defendant insuring Tomatrans and nominated sub-contractors. As a result of two cases of lorries belonging to Tomatrans being hijacked and stolen, Diethelm made two claims to the plaintiff. The plaintiff paid Diethelm the sums of RM372,852.01 and RM158,454.59 respectively, and claimed for contribution against the defendant in the amount of RM254,162.65. The issue for determination was G H I

whether the plaintiff was entitled in law to seek contribution from the defendant, which required the court to firstly decide whether there was double insurance.

Held (dismissing the claim with costs):

(1) PW1's testimony that Tomatrans took out insurance to cover the interests of Diethelm was premised on the wording of the defendant's policy stating that it covered the interests of cargo owners. While it could not be disputed that Tomatrans took out insurance for and on behalf of cargo owners, the wording itself was insufficient to prove the fact that Tomatrans had taken out insurance for Diethelm. Mere reliance on the words "cargo owners" did not establish that Tomatrans had taken out insurance to cater for Diethelm's interests. Since Diethelm had written to Tomatrans expressly stating that it had its own insurance coverage and that it would not be making any claim against Tomatrans for the goods in transit, it was only reasonable to conclude that there was no need for Tomatrans to take out insurance for Diethelm. Even assuming that Tomatrans had effected an insurance upon the interests of Diethelm from the mere words "cargo owners", there was no evidence that Diethelm had given its authority or had elected to adopt the insurance. (paras 13 & 14)

(2) Furthermore, although both the plaintiff's and the defendant's policies were expressed to be Marine Cargo Policies, they were in fact different in scope. The condition of cover under the defendant's policy was only by land conveyance whereas under the plaintiff's policy, the terms and conditions of cover were by air, sea and inland transit. In respect of the inland transit, the plaintiff's policy covered Malaysia, Singapore, Brunei and Thailand and although the defendant's policy covered Peninsular Malaysia and Singapore, it must be noted that the agreement between Diethelm and Tomatrans was only for the southern zones of West Malaysia. Thus, Tomatrans would not be transporting Diethelm's goods to Singapore and to other places in West Malaysia. In that regard, the defendant's insurance policy could not be said to be taken out by Tomatrans for Diethelm. (para 16)

(3) The wording of both policies showed that they were different in scope and interests insured, although it was apparent that they did overlap. However, the fact that there is an incidental or some overlap between two insurance policies taken out by an insured will not by itself constitute double insurance. Having regard to the total evidence, the plaintiff had not proven the fact that there was another insurance policy such that Diethelm was to receive two sums for having two insurances instead of one. Therefore, since it had not been shown that there was double insurance, the issue of contribution did not arise. (paras 17 & 18)

Legislation referred to:
Marine Insurance Act 1906 [UK], s. 80

Other source(s) referred to:
MacGillivray & Parkington, *Insurance Law*, 8th edn, para 1715
Poh Chu Chai, *Principles of Insurance Law*, 5th edn, p 805

For the plaintiff - Arun Krishnalingam; M/s Sativale Mathew Arun
For the defendant - Philip Teoh; M/s Philip Teoh & Co

Reported by Suresh Nathan

JUDGMENT

Tengku Maimun J:

[1] The plaintiff insured the entire Diethelm and its associated companies under a Marine Open Cover Policy. The policy is for any loss or damage to Diethelm's goods being shipped as an export/import from any ports/airports and/or places in the world from warehouse to warehouse and also for all inland transit and transportation from any of Diethelm's premises to customers/principals/dealers/stockists and/or ports/airports and *vice versa* within Malaysia, Singapore, Brunei and Thailand. The policy covers the period of 1 January 2005 until 31 December 2005.

[2] Diethelm had a written transport and delivery agreement with Tomatrans (M) Sdn Bhd for the transportation of the goods belonging to Diethelm in the southern zones of West Malaysia. Tomatrans had taken out a Marine Cargo Insurance Policy with

A the defendant. The insured under the defendant's policy is Tomatrans and the nominated sub-contractors and the interest insured are "Goods Held in Trust". The territorial limit of the policy was within Peninsular Malaysia and Singapore and the period of insurance was from 18 March 2005 to 17 March 2006.

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[3] As a result of two cases of theft and hijack of two lorries belonging to Tomatrans in Johor on 14 September 2005 and 11 October 2005 respectively, Diethelm made two claims to the plaintiff. After being verified by Crawford & Company Adjusters C (Malaysia) Sdn Bhd, the plaintiff paid Diethelm the amounts of RM372,852.01 and RM158,454.59 respectively. The plaintiff is now claiming for contribution against the defendant for the sum of RM254,162.65.

D **[4]** Miss Wo Yoke Fong (PW1) gave evidence that in the course of the investigation, the plaintiff found out that the policy taken out by Tomatrans was for the interest of the cargo owners of goods held in trust and the policy covers the period of Diethelm's loss; that there was double insurance on the goods; that the E policies issued by the plaintiff and the defendant both covered the same goods; that the goods belonged to Diethelm; that both policies insure the same rights and interest in the damaged or lost property as both policies are all risks policies; and that a right of contribution exists in law. PW1 had also explained how the figure F claimed for contribution was arrived at.

[5] The defendant did not lead any evidence but its pleaded case is as follows:

> 3. Defendan mempunyai polisi insuran untuk Tomatrans (M) G Sdn Bhd (selepas ini dirujuk sebagai "Tomatrans") untuk perlindungan barangan yang dipegang di bawah amanah untuk barangan pelanggan Tomatrans yang meminta perlindungan insurans.
>
> 5. Tomatrans tidak mengeluarkan perlindungan insurans untuk H Diethelm Logistic Services Sdn Bhd (selepas ini dirujuk sebagai "Diethelm").
>
> **Butir-butir**
>
> Diethelm telah memberitahu Tomatrans bahawa Diethelm I tidak memerlukan perlindungan insurans daripada Tomatrans. Diethelm melalui surat-surat bertarikh 19hb Mei 2004 dan 30 Julai 2004 memaklumkan kepada Tomatrans bahawa

> Diethelm mempunyai insurans goods in transit sendiri dan Diethelm tidak akan membuat tuntutan gantirugi terhadap Tomatrans.

[6] The letters referred to in the statement of defence are reproduced below. The letter dated 19 May 2004 from Diethelm to Tomatrans states:

> In regards to your enquiry on insurance coverage under taken by DLS, we have insurance for "Goods in Transit" of which we have a group wide coverage.
>
> As is stated in our contract under 8/liability, DLS reserve the right to recover any loss etc from our carriers.
>
> We carry our own insurance cover, we would determine on a case to case basis any claim. Should we take a claim under our insurance, there would not be any claim for re-imbursement, against you (resulting in double claim).

[7] Diethelm again wrote to Tomatrans *vide* a letter dated 30 July 2004 which reads:

> In regards to your enquiry on insurance coverage under taken by DLS, we have insurance for "Good in Transit" of which we have a group wide coverage.
>
> As stated in our contract under clause 8/liability, DLS reserve the right to recover any loss etc. from our carrier.
>
> In event of loss resulting from all accident or hijack of our carrier's lorries, subjected to a report made to the police and its subsequent investigation. DLS agreed the loss would be covered by our own insurance coverage and there would be no subsequent claim against you.

[8] In cross examination PW1 agreed that the letters stated that if Diethelm claimed from the plaintiff under their own policy, then the plaintiff would not be claiming against Tomatrans. It was put to PW1 in cross examination that from the two letters, there was no need for Tomatrans to take up insurance cover for and on behalf of Diethelm because Diethelm has their own coverage, to which PW1 disagreed. PW1 however agreed that Diethelm was not named in the defendant's policy and that the defendant's policy is more limited in scope as compared to the plaintiff's policy.

[9] Learned counsel for the plaintiff argued that the above letters do not support the defendant's case that Tomatrans had not taken out insurance on behalf of Diethelm. As a matter of fact, learned counsel submitted that only Tomatrans would know if they are taking out insurance and on whose behalf. This, argued learned counsel, is a question of fact and not construction. Since the defendants failed to lead any evidence to show that these letters led Tomatrans to exclude Diethelm from the scope of the cover or that Tomatrans never intended to cover Diethelm in their policy, learned counsel contended that the defence must fail. It was also the submission of learned counsel that the two letters is not relevant to the plaintiff's claim for contribution but would only be relevant if the plaintiff is claiming under subrogation which is not the case here.

Finding

[10] The plaintiff's case is founded on s. 80 of the Marine Insurance Act 1906 (UK) and under the general principles of insurance law and equity which provides that a right of contribution arise when there is double insurance.

[11] The real issue to be determined, as submitted by learned counsel for the plaintiff is whether as a matter of law, the plaintiff is entitled to seek contribution from the defendant. Before the court decides on this issue, the court has to first decide whether there is double insurance. A double insurance situation will arise when a person insures a particular risk with two or more insurers. There cannot be double insurance unless there exists another contract of insurance and the same insured is covered in respect of the same property against the same risk (see *Principles of Insurance Law* 5th edn by Poh Chu Chai).

[12] The insured under the plaintiff's insurance is Diethelm and the insured under the defendant's policy is Tomatrans and its nominated sub-contractors. The subject matter of the plaintiff's policy is the goods of Diethelm. The subject matter of the defendant's policy is "the cargo owners". Diethelm's goods are not specifically stated in the defendant's policy. By virtue of the agreement between Diethelm and Tomatrans, Diethelm would be one of the cargo owners. However, it is a fact that under the agreement there is no obligation for Tomatrans to take out

insurance policy for Diethelm and it is also a fact that Diethelm had informed Tomatrans that Diethelm had their own "group wide coverage" and that Diethelm would be covered by their own insurance coverage.

[13] PW1 said that Tomatrans took out insurance to cover the interest of Diethelm. Her testimony is premised on the wordings of the defendant's policy which states that it covers the interest of cargo owners. Whilst it cannot be disputed from the wordings that Tomatrans took out insurance for and on behalf of cargo owners, I am of the view that the wording itself is insufficient to prove the fact that Tomatrans had taken out insurance for Diethelm. By merely relying on the words "cargo owners" I am not able to accept that Tomatrans had taken out insurance to cater for the interest of Diethelm in the light of the agreement and the two letters referred to above. And I do not think that the relevancy of the letters depended on whether the plaintiff's claim is one of contribution or subrogation. What matters is the letters made it clear that it was not intended by Diethelm that they would be making insurance claim against Tomatrans for the goods in transit. Since the letters expressly state that Diethelm had their own insurance coverage and Diethelm would not be making any claims from Tomatrans, it is only reasonable to conclude that there was no need for Tomatrans to take out insurance for Diethelm. In that regard I find that the letters do support the defence.

[14] Even assuming that Tomatrans has effected an insurance upon the interest of Diethelm from the mere words of "cargo owners", there was no evidence that Diethelm has given its authority or has elected to adopt the insurance. The letters do not signify the authorization or ratification by Diethelm.

[15] *MacGillivray & Parkington on Insurance Law* 8th edn states at para 1715:

> If an insurance is effected in the name of or upon the interest of a third party without his authority, such person has the option of adopting the insurance retrospectively so as to constitute a double insurance from the time it was effected but if he does not elect to adopt the insurance it cannot be treated as a double insurance by the other insurers.

[16] Further, although both the plaintiff's and the defendant's policies are expressed to be Marine Cargo Policies, they are in fact different in scope. The condition of cover under the defendant's policy is only by land conveyance whereas under the plaintiff's policy, the terms and conditions of cover are by air, by sea and inland transit. In respect of the inland transit, the plaintiff's policy covers Malaysia, Singapore, Brunei and Thailand and although the defendant's policy covers Peninsular Malaysia and Singapore it must be noted that the agreement between Diethelm and Tomatrans is only for the southern zones of West Malaysia. Hence, Tomatrans would not be transporting Diethelm's goods to Singapore and to the other places in West Malaysia. In that regard the defendant's insurance policy could not be said to be taken out by Tomatrans for Diethelm.

[17] Looking at the wordings of both policies I find that the plaintiff's policy and the defendant's policy are different in scope and interests insured although it is apparent that they do overlap. But the fact that there is an incidental or some overlap between two insurance policies taken out by an insured will not by itself constitute double insurance. (*Principles of Insurance Law*, *supra*, at p. 805).

[18] Having regard to the oral testimony and the documentary evidence in totality I find that the plaintiff has not proven the fact that there was another insurance policy such that Diethelm is to receive two sums for having two insurances instead of one. Until and unless the plaintiff has discharged the onus to prove its case, the burden does not shift to the defendant. Therefore it does not matter that the defendant has not led any evidence. And since it has not been shown that there was double insurance, the issue of contribution does not arise. The plaintiff's claim is accordingly dismissed with costs.